In the Muar appeal the notice of appeal was served on the respondent fourteen days after what was said to be the last day for service. In the present case the notice of appeal was served on the respondents one month and seven days after the last day prescribed for filing it in court. The view of the learned counsel for the appellant seems to be that no application for extension of time is required and that the service of the notice of appeal effected on the respondents on 24th July, 1971 is absolutely valid and good in law as there are no restrictions imposed upon the appellant under O. 39, r. 2(6). The appellant's counsel was duly notified by the counsel for the two respondents that the service of the notice of appeal was accepted only under protest and that at the hearing of the appeal an objection would be taken to the maintenance of the appeal. Cases no doubt should be heard and decided on merits and not on technicalities of procedure *alone*. Rules are, however, meant to be observed, followed and respected. I am unable to accept the interpretation put on O. 39, r. 2(6) by the learned counsel for the appellant as the effect of that would be that the notice of appeal could be served on the respondents along with the memorandum of appeal and the appeal record. It could as well be urged that there was no necessity to serve the notice of appeal if the appeal record was duly served and contained (as it always must) a copy of the notice of appeal. Carried to its logical, though extreme, conclusion, the argument could land oneself in the situation where the appellant could with immunity say that the notice of appeal could be served on the day of the hearing of the appeal or even afterwards. This to me is absurd and obviously against the intention of the framers of the Subordinate Courts Rules. It is not without regret that I have to say that no application or attempt has even now been made to urge upon the court that in the circumstances the delay, if any, should be excused or time extended for affecting such service or to correct the position so that the appeal could be heard on its merits. Maybe the appeal has merits. The learned counsel seems to insist upon the correctness and the firmness of his stand and seems to have thrown away the scabbard. The courts generally are disinclined to exercise their discretion in favour of a party that is reluctant to own a mistake. The question of the exercise of any discretion has not arisen. The objection consequently succeeds and the appeal is on that ground dismissed with costs.

Appeal dismissed.

Solicitors: *Cheang Lee & Ong; Peh Swee Chin.*

LEE CHIN HOCK v. PUBLIC PROSECUTOR

[F.C. (Suffian, Gill and Ong Hock Sim F.JJ.) May 4, 1972]

[Kuala Lumpur — Federal Court Criminal Reference No. 6 of 1971; Malacca Criminal Appeal No. 15 of 1971]

Internal Security Act, 1960, ss. 22, 25 & 57 — Possession of prohibited documents or publications without lawful excuse — Onus of proof.

Criminal Law and Procedure — Reference made to Federal Court on a question of law of public interest — Courts of Judicature Act, 1964, s. 66.

Evidence — Burden of proof — Without lawful excuse — Evidence Ordinance, 1950, ss. 105 and 106.

This was a reference under section 66 of the Courts of Judicature Act, 1964, on the application of the accused, the appellant herein, reserving for the decision of the Federal Court, a question of law of public interest, the question being: "In a prosecution for an offence under section 25(1) of the Internal Security Act No. 18/60 whereby 'any person who without lawful excuse has in his possession any document or publication the possession of which is prohibited . . .' do the words *'without lawful excuse'* place the onus of such fact on the accused person or does it still lie with the prosecution?"

The facts giving rise to this reference appear sufficiently from the judgment below.

Held: (1) "lawful excuse" is not defined in section 25(1) of the Internal Security Act, 1960, and it is impossible for the prosecution to anticipate and rebut in advance, any explanation the accused person may offer in exculpation. Thus, in the absence of a definition of "lawful excuse", it is open to the accused to tender any sort of excuse, however fanciful and flimsy, the legality or sufficiency of which is to be determined by the court. This is peculiarly within the knowledge of the person charged and section 106 of the Evidence Ordinance clearly applied in that the burden of proving that fact was on the appellant. Therefore, it was not for the prosecution to prove the absence of lawful excuse;

(2) however, the fact that section 57 of the Internal Security Act, by express words, places the onus of proving the presence of lawful excuse on a person charged with having in his possession without lawful excuse fire-arms, *etc.*, did not affect the answer to the question posed in this reference because those express words were put in by the legislature *ex abundanti cautela.* In the result the order of the High Court directing that the case be sent back to the learned magistrate to call on the accused for his defence, must be affirmed.

Cases referred to:-

(1) *Public Prosecutor* v. *Yeoh Siew Beng* [1965] 1 M.L.J. 119.

(2) *R.* v. *Turner* 105 E.R. 1026 at p. 1028.

(3) *R.* v. *Stone* 102 E.R. 247 at p. 253.

(4) *Busu* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 140, C.A.

(5) *Abdul Manap* v. *Public Prosecutor* [1952] M.L.J. 140, C.A.

(6) *Williams* v. *Russell* 141 L.T.R. 190 at p. 191.

(7) *Public Prosecutor* v. *Lim Kwai Thean* [1959] M.L.J. 179 at p. 180.

(8) *Emperor* v. *Dahyabhai Savchand Jhaveri* A.I.R. (1941) Bom. 273.

FEDERAL COURT.

F. H. D'Cruz for the appellant.

Ahmad bin Haji Abdul (Deputy Public Prosecutor) for the respondent.

Ong Hock Sim F.J. (delivering judgment of the court): This is a reference under section 66 of the Courts of Judicature Act, 1964, on the application of

an accused person (hereinafter referred to as "the appellant") reserving for the decision of this court a question of law of public interest, the question being:

"In a prosecution for an offence under section 25(1) of the Internal Security Act No. 18/60 whereby 'any person who without lawful excuse has in his possession any document or publication the possession of which is prohibited... shall be guilty of an offence...' do the words ' without lawful excuse' place the onus of such fact on the accused person or does it still lie with the prosecution?".

The facts giving rise to this reference are as follows. Where it appears to the Minister of Home Affairs that any document and publication is of the kind mentioned in section 22 of the Internal Security Act he may by order published in the *Gazette* prohibit the printing, sale, issue, circulation or possession of that document or publication. The Minister made such an order in respect of a book entitled "Advantages of Simplified Chinese Characters" published by the Hong Kong Publishing Trading Co. at 46B Nathan Road, Hong Kong, which order was published in the *Gazette* as P.U.(A) 380 dated 22nd October, 1970. The appellant has a bookshop at 13 Jalan Bunga Raya, Malacca. On 13th February, 1971, a police party visited it and found eight copies of this prohibited book, and accordingly the appellant was charged with in effect having, without lawful excuse, in his possession those books, though the charge did not expressly use the words "without lawful excuse". The charge alleged that the appellant had committed an offence punishable under section 25(1) of the Internal Security Act.

Now section 25 provides as follows:

"(1) Any person who without lawful excuse has in his possession any document or publication the possession of which is prohibited by an order under section 22, or any extract therefrom, shall be guilty of an offence against this Part and shall be liable in respect of a first offence under this section to imprisonment for a term not exceeding one year or to a fine not exceeding one thousand dollars, or to both such imprisonment and fine and, in respect of a subsequent offence, to imprisonment for a term not exceeding two years.

(2) In any proceedings against any person for an offence against this section such person shall be presumed, until the contrary is proved, to have known the contents and the nature of the contents of any document or publication immediately after such document or publication came into his possession."

It is to be observed, first, that the section does not make bare possession of prohibited documents an offence; what is an offence under that section is possession *without lawful excuse*. Secondly, it is to be observed that the section does not say on whom lies the burden of proving the presence of lawful excuse. This is in contrast with the offence created by section 57 of the Act which clearly provides that the burden of proving the presence of lawful excuse lies on the accused. That section reads —

"(1) Any person who without lawful excuse, the onus of proving which shall be on such person, in any security area carries or has in his possession or under his control —

(a) any fire-arm without lawful authority therefor; or

(b) any ammunition or explosive without lawful authority therefor,

shall be guilty of an offence against this Part and be punished with death.

(3) A person shall be deemed to have lawful excuse for the purposes of this section only if he proves —

(a) that he acquired such fire-arm, ammunition or explosive in a lawful manner and for a lawful purpose; and

(b) that he has not at any time while carrying or having in his possession or under his control such fire-arms, ammunition or explosive, acted in a manner prejudicial to public security or the maintenance of public order."

It was the defence contention before the trial magistrate that on a charge for an offence under section 25(1) of the Internal Security Act No. 18 of 1960 what was punishable was not the possession of a publication prohibited by order made under section 22 of the Act but possession "without lawful excuse" and further that the onus of proving absence of lawful excuse lay upon the prosecution. The omission of the underlined words, in counsel's submission, was meant not to displace the burden resting on the prosecution to prove every ingredient in the charge including the *absence of any lawful excuse*. He argued that if the legislature had intended to do so, it would have adopted the form of drafting section 25(1) as that in section 57(1).

The magistrate was satisfied —

"on the facts that there is *prima facie* evidence of possession of prohibited publication".

He agreed with counsel and says:

"I find the burden is still on the prosecution to prove that possession was without lawful excuse... If it had been the intention of the legislature to shift the burden on the defendant then it would state in clear terms in the Act as it had done in section 57(1)."

He accordingly discharged and acquitted the accused.

On appeal by the deputy, without argument other than a reference to Muar High Court Criminal Appeal No. 53 of 1970, the learned judge remitted the case to the magistrate with a direction to call for the defence of the accused.

Following this order, a successful application was made some weeks later by the respondent's counsel for the question under reference to be made to this court. We have not seen the grounds for such application and the notes of argument show reference to section 25(1) and section 57(1), Muar Criminal Appeal No. 53 of 1970 and the case of *Public Prosecutor* v. *Yeoh Siew Beng*.[1]

Before us it is argued on behalf of the appellant that —

(1) the cardinal principle in all cases is that the onus is always on the prosecution to make out a *prima facie* case against the accused;

(2) there must be clear and express statutory interference to shift the burden from the prosecution to the defence; and

(3) in the absence of clear and express interference by the legislature, sections 105 and 106 of the Evidence Ordinance cannot be invoked to shift this burden onto the accused.

Those two sections read as follows —

"105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.

106. When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Counsel also refers to the following rules of interpretation: if the legislature uses one language in one section and a different language in another section, that difference is deliberate and a different meaning is intended; if the legislature makes a mistake, the court must not correct it but must apply the law as enacted; the legislature does not intend to alter any existing law unless it expressly so declares; and finally in criminal law if there is any doubt as to the meaning of any statute the court should lean in favour of the liberty of the subject.

In granting the application under section 66 of the Courts of Judicature Act, the learned judge referred to his judgment in Muar Criminal Appeal No. 53 of 1970. That case concerned a person who was charged under section 120(a) of the Income Tax Act for failing to comply *without reasonable excuse* with a notice under section 81. The trial magistrate giving his reason for acquitting the defendant said:

"The defendant must be proved to have failed to furnish the information required in the said notice without reasonable excuse as stated in the charge against him. There is no evidence at all that the defendant failed to furnish the information without reasonable excuse.".

The words now quoted appear to be those of the appellate judge who says:

"The law always presumes the innocence of the accused and on that ground the prosecution has to prove every fact necessary to substantiate the charge against the accused. In other words in criminal cases the burden of proof, unless shifted by legislative interference, always falls on the prosecution and in order to warrant a conviction the prosecution has of necessity to lead evidence to meet any defence that may be open to the accused by virtue of the offence defined in the statute. Thus if a statute in the direct description of an offence and not by way of a proviso contains a negative matter the charge must contain an allegation of such negative matter and that allegation itself must also be supported by *prima facie* evidence."

Many cases were cited in the judgment but in our view they do not assist us in the determination of the question before us. To say that the prosecution has of necessity to lead evidence to meet any defence that may be open to the accused is to place upon it an impossible burden. As is said by Lord Ellenborough C.J. in *R.* v. *Turner*: [2]

"The question is upon whom the *onus probandi* lies; whether it lies upon the person who affirms a qualification, to prove the affirmative, or upon the informer, who denies the qualification to prove the negative. There are, I think, about ten different heads of qualification enumerated in the Statute to which proof may be applied; and according to the argument of to-day, every person who lays an information of this sort is bound to give satisfactory evidence before the Magistrates to negative the defendant's qualification upon each of these several heads. The argument really comes to this, that there would be a moral impossibility of ever convicting upon such an information. If the informer should establish the negative of any part of these different qualifications, that would be insufficient, because it would be said, *non liquet*, but that the defendant may be qualified under the other: And does not common sense shew, that the burden of proof ought to be cast on the person who, by establishing any one of the qualifications, will be well defended? Is not the Statute of Anne in effect a prohibition on every person to kill game, unless he brings himself within some one of the qualifications allowed by law; the proof of which is easy on the one side but almost impossible on the other?"

Bayley J. in the same case says:

"I have always understood it to be a general rule that if a negative averment be made by one part, which is peculiarly within the knowledge of the other, the party within whose knowledge it lies, and who asserts the affirmative is to prove it and not he who avers the negative".

"Lawful excuse" is not defined in section 25(1) and it is well-nigh impossible for the prosecution to anticipate — and rebut in advance — any explanation the accused person may offer in exculpation.

In *R.* v. *Stone*,[3] Lawrence J. says:

"Then as to the mode of proof by which the charge is to be sustained, I see no reason why the proof of the fact committed by the defendant should not *prima facie* be sufficient, at least so as to throw the onus upon him of proving that he was qualified to do it. The difficulty of proving the negative of all the qualifications stated is so great as to make it impossible in some cases for a prosecutor to do it."

In the absence of a definition of "lawful excuse", it is open to the accused to tender any sort of excuse, however fanciful or flimsy, the legality or sufficiency of which is to be determined by the court. This is peculiarly within the knowledge of the person charged and section 106 of the Evidence Ordinance earlier referred to clearly applies. Three cases need only be mentioned to show that the question had already been resolved in our courts. They are:

1) *Busu* v. *Public Prosecutor*[4] — a case under regulation 4(1) of the Emergency Regulations, 1948; Willan C.J. said there were three ways for a person not of the class or category mentioned in regulation 4(2) to escape liability, namely, to show (a) he had a licence, or (b) he was an authorised person or (c) an exempted person. He went on to say:

"If, therefore, it is necessary for the prosecution to call *prima facie* evidence that an accused had no licence, equally it must be necessary for them to call *prima facie* evidence regarding (b) and (c) above.

For the prosecution to adduce *prima facie* evidence regarding (a), (b) and (c) above would place an onus on them of giving negative proof regarding lack of qualifications, when in fact the existence of those qualifications is especially within the knowledge of the accused."

2) *Abdul Manap* v. *Public Prosecutor*[5] — it was held that it is not an essential part of the case for the prosecution to prove the absence of lawful authority [call it "excuse" in the instant case] and that the onus of the negative averment was on the accused to prove he had lawful authority. Spenser Wilkinson J. delivering the judgment of the court quoted with approval a passage from the judgment of Talbot J. in *Williams* v. *Russell*:[6]

"...Where it is an offence to do an act without lawful authority, the person who sets up lawful authority must prove it and the prosecution need not prove the absence of lawful authority."

3) *Public Prosecutor* v. *Lim Kwai Thean*[7] — a case under the Emergency (Registration Areas) Regulations, 1948 involving onus to establish whether person is or is not required to be registered. We quote this time from Good J. acting in revision:

"At the trial, Mr. Yeo, counsel for the accused, submitted that the onus lay upon the prosecution to establish affirmatively that the accused was a person required to be registered under the Regulations and submitted that as no such proof had been

given by the prosecution, there was no case for the accused to answer. The learned Magistrate accepted that submission and acquitted the accused without calling upon him for his defence.... There is only one point in these proceedings, and that is the point which was the subject matter of Mr. Yeo's submission at the trial. The question is: Where does the onus of proof lie in order to establish that a person is, or is not, as the case may be, a person required to be registered under these Regulations?... Does the onus lie upon the prosecution to prove that any particular person who fails or refuses to produce an identity card on demand by a Police Officer is not a member of one of the excepted categories, or does the onus lie upon the person concerned to prove that he is an excepted person? In my opinion, the effect of section 106 of the Evidence Ordinance is quite clear: 'When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him,' and then follows the very well-known illustration (b) — the railway ticket illustration. To interpret that section properly, I think it is essential to concentrate upon what was meant by the word 'especially'. It does not say " 'exclusively,' or 'solely,' within the knowledge of any person." And, as I see it, the effect of the word 'especially' is this: That if it is an easy matter for the person concerned to prove a fact the proof of which by the prosecution would present the prosecution with inordinate difficulties, then ordinary common sense demands that the balance of convenience should be in favour of the prosecution."

It would appear that all these three decisions were based on the application of section 106 of the Evidence Ordinance.

Here the appellant was accused of an offence of having in his possession prohibited documents without lawful excuse. If he had a lawful excuse, that fact would be especially within his knowledge. Section 106 in the clearest language provides that the burden of proving that fact is on the appellant. It follows therefore that it is not for the prosecution to prove the absence of lawful excuse.

In our opinion section 105 of the Evidence Ordinance also is relevant. The presence of lawful excuse brings the case of the appellant within an exception in section 25(1) of the Act, the law defining the defence. By that section, the burden of proving that circumstance is upon the appellant and the court shall presume the absence of such circumstance.

Commenting on the corresponding provision of the Indian Evidence Act, Beaumont C.J. in *Emperor* v. *Dahyabhai Savchand Jhaveri*[8] said:

"It seems to me that (the section) is a general provision which imposes the burden of bringing himself within an exception upon the person who relies on the exception."

Indeed the illustrations given by the Ordinance to the section vividly show by necessary analogy that it is for the appellant in this case to show that he had a lawful excuse for having in his possession these prohibited documents.

We are of the opinion that the fact that section 57 of the Internal Security Act by express words places the onus of proving the presence of lawful excuse on a person charged with having in his possession without lawful excuse fire-arms, *etc.*, does not affect the answer to the question posed in this reference, because in our view those express words were put in by the legislature *ex abundanti cautela.* In the result, the order of the High Court dated the 19th day of August, 1971 directing that the case be sent back to the learned magistrate to call on the accused for his defence is affirmed.

Reference answered.

Solicitors: *Tay Leong Siak & Co.*

LEE SOO CHUAN v. LAI AH YAN & ANOR.

[F.C. (Suffian Ag. L.P., Gill and Ong Hock Sim F.JJ.) May 4, 1972]

[Kuala Lumpur — Federal Court Civil Appeal No. 105 of 1971]

Practice and Procedure — Appeal from court of senior inspector of mines — Mode of — Wrong procedure adopted — Effect of — Subordinate Courts Rules, 1950, O. 39 — R.S.C. 1957, O. 59 rr. 1 and 2, O. 70.

In this appeal, there were two questions to be determined: (a) what is the procedure to be adopted on an appeal from a decision of the senior inspector of mines; and (b) if the respondents were right that the procedure should have been by way of a notice of appeal followed by a memorandum of appeal, could the court treat the originating motion, the procedure adopted by the appellants, as an irregularity?

Held: allowing the appeal: (1) an appeal from the decision of a senior inspector of mines must be brought in the same way as a civil appeal from a sessions court or magistrate's court, in accordance with the procedure laid down in O. 39 of the Subordinate Courts Rules, 1950, followed by the procedure contained in O. 59 rr. 1 and 2 of the Rules of the Supreme Court, 1957;

(2) the originating motion was not a nullity but a mere irregularity which could be cured under R.S.C. 1957, O. 70. Therefore, the order of the court below would be set aside, with the exception of costs, and substituted by an order that the originating motion was to stand as a notice of appeal as well as a record of appeal. In the result, a copy of this order was to be served by the appellant on the senior inspector of mines and a deposit of $150 by way of security for the costs of the appeal was to be lodged in his court.

Necessity to observe the Rules of Court emphasised.

[Editorial Note: Reference may usefully be made to *Lee Soon Chuan* v. *Lai Ah Yan & Anor.* [1971] 2 M.L.J. 275.]

Cases referred to:-

(1) *In re application of (1) Chong Fye Lee and (2) Toong Hing Loong Tin Mining Co. Ltd.* [1965] 1 M.L.J. 29.

(2) *Pontin & Anor.* v. *Wood* [1962] 1 All E.R. 294, 297.

(3) *Sundaram* v. *Chew Choo Khoon* [1968] 2 M.L.J. 40.

FEDERAL COURT.

A. Sivalingam (*V. P. Nathan* with him) for the appellant.

Morris Edgar (*T. K. Tang* with him) for the respondents.

Gill F.J.: Lai Ah Yan (f) and Chiang Peng Lam alias Chiang Kok Peng are the registered lessees of the land held under mining certificate No. 1517 for lots 3234 and 9648 in the mukim of Petaling in the district of Kuala Lumpur. Their predecessor in title, one Yap Shak Lin had sub-leased the said mining land to Lee Soo Chuan on 23rd September, 1967.

On 4th December, 1970 the lessees lodged a memorandum in writing, under section 99 of the Min-